In the

UNITED STATES COURT OF APPEALS

For the NINTH CIRCUIT

UNITED STATES OF AMERICA, For the Use and Benefit of CHICAGO BRIDGE & IRON COMPANY, an Illinois corporation, Appellant. vs. ETS-HOKIN CORPORATION, a California corporation, and THE TRAVELERS INDEMNITY COMPANY, a Connecticut corporation, Appellees.	No. 21816

APPELLEES' BRIEF

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STATEMENT OF JURISDICTION

The United States District Court for the Northern District of California had jurisdiction to hear Appellees' Petition to Confirm Arbitration Award under Section 9 of the United States Arbitration Act, 9 U.S. Code §9, and to hear Appellant's Application for Order of the Court to Set Aside Arbitration Award under Section 10 and 11 of the United States Arbitration Act, 9 U.S. Code §§10 and 11. This Court has jurisdiction to determine this appeal under 28 U.S. Code §1291. The judgment of the United States District Court for the Northern District of California, from which this appeal has been taken, was entered on January 16, 1967. Appellant filed its notice of appeal on February 15, 1967,*/ the thirtieth day after entry of judgment. Therefore, this appeal is timely.

STATEMENT OF THE CASE

Statement of Facts

Appellee Ets-Hokin Corporation (hereinafter "Ets-Hokin") is the prime contractor and the United States Bureau of Reclamation, Department of the Interior, is the owner under United States Government Contract No. 14-06-D-4429, dated

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*/ On page 2 of its Opening Brief, Appellant states that it filed its notice of appeal on March 14, 1967, which was the fifty-seventh day after entry of judgment. If this were true, Appellees would contend that this appeal was not timely, as they have in appeal No. 21033, with which this appeal has been consolidated for hearing.

June 25, 1962, which calls for Ets-Hokin to perform certain work in the completion of the powerhouse and switchyard at the Glen Canyon Dam, Page, Arizona. Appellee The Travelers Indemnity Company (hereinafter "Travelers") is Ets-Hokin's surety on the prime contract and has furnished the performance and payment bonds required by section 1 of the Miller Act, 40 U.S. Code §270a. Appellant Chicago Bridge & Iron Company (hereinafter "CB&I") entered into a written subcontract with Ets-Hokin on August 22, 1962, which called for CB&I to perform a portion of the work required under the prime contract. (Tr. pp. 119-124.)

During the performance of the prime contract and the subcontract a dispute arose between Ets-Hokin and CB&I as to whether CB&I was required to perform certain work, namely, the prestressing of the turbine spiral cases, under the subcontract. CB&I denied that it was required to do this work and refused to do the same. Ets-Hokin performed the work and to cover the cost of doing the work withheld from CB&I's progress payments the sum of $37,077.56.

On or about July 8, 1964, CB&I filed in the United States District Court for the District of Arizona, Prescott Division, action number Civ. 917 Pct. In this action, under section 2 of the Miller Act, 40 U.S. Code §270b, CB&I sought judgment from Ets-Hokin and Travelers on said Miller Act payment bond in the amount of said sum of $37,077.56. On August 14, 1964, Ets-Hokin demanded arbitration in accordance

with Article 23 of the General Conditions of the subcontract. (See Misc. Exhibits to Transcript.) On or about August 20, 1964, Ets-Hokin and Travelers filed a Motion for Stay of Action Pending Arbitration under Section 3 of the United States Arbitration Act, 9 U.S. Code §3. On or about August 27, 1964, CB&I filed its Response to that Motion for Stay Pending Arbitration.

On August 26, 1964, oral argument on the Motion for Stay Pending Arbitration was held before Judge Muecke of the District Court. At the oral argument counsel for Appellees stipulated that Travelers would be bound by any award entered by the arbitrators. Judge Muecke granted the motion from the bench at the conclusion of the oral argument and entered the following minute order:

> "It is ordered that Defts' Motion for Stay of action pending arbitration is granted, only as to specific items raised in the motion, subject to either party coming back to the court for relief by reason of any delay in such arbitration."

CB&I did not appeal from the stay order.

In accordance with the court's order CB&I selected as its arbitrator Mr. L. A. Elsener and Appellees selected Mr. J. P. Murphy. Messrs. Elsener and Murphy selected as the third arbitrator Mr. T. J. Corwin, Jr.

On March 9, 1965, the arbitrators requested counsel to submit to the arbitration board a brief memorandum of their clients' positions. Such memoranda of position (Tr. pp. 66-76)

were filed with the arbitrators by Appellees and Appellant on March 22, and March 23, 1965, respectively. These memoranda were referred to by the court below in paragraph (f) on page 5 of its Order Confirming Award of Arbitrators. (Tr. p. 134.)

Late in April, 1965, the arbitrators had their first formal meeting. At that time, Mr. Corwin, the neutral arbitrator, presented a set of 21 questions which he desired to have answered by the parties in order to give the board a complete background of the technical dispute between the parties. Answers to these questions were delivered to the board by the parties at the opening of the arbitration hearing on July 6, 1965. The questions of Mr. Corwin and Appellees' answers thereto were submitted to the court below by CB&I as exhibits to its Objections to Confirmation of Award. (Tr. p. 18.) The District Court referred to the answers in paragraph (e) on page 5 of its Order Confirming Award of Arbitrators (Tr. p. 134.)

The arbitration hearing was held in San Francisco, on July 6 and 7, 1965, At the outset of the hearing, after preliminary statements by counsel for both parties, counsel for CB&I called as its witness Mr. J. Graham Daniels, District Sales Manager of CB&I. Mr. Daniels testified that CB&I and Ets-Hokin had entered into the subcontract which was before the board, that CB&I had performed all of its obligations under the subcontract, and that there remained due and owing on the

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subcontract the sum of $37,077.56. (RTAP*/ pp. 7-12.) At this point, counsel for CB&I stated he was resting his case and called upon the board to make an award in CB&I's favor based only upon the foregoing testimony of Mr. Daniels and application of the parol evidence rule. (RTAP pp. 12-16.) Counsel for Appellees argued that the very issue before the arbitrators was the meaning of the subcontract, that the board was not in a position to rule that the contract was unambiguous on its face, and that therefore the board should not preclude the introduction of extrinsic evidence to explain the meaning of the subcontract. (RTAP pp. 16-17, 23-24.) The board decided to take CB&I's counsel's motion for an immediate award under advisement and determined to proceed with further testimony. (RTAP p. 27.) Most of the remaining testimony taken over the next day and one-half of hearing concerned itself with the negotiations leading up to the signing of the subcontract and the interpretation of the parties of the various terms of preliminary offers and of the subcontract itself. A relatively small portion of the testimony had to do with the calculation of the backcharges by Ets-Hokin against CB&I which were the subject of the dispute.

At the hearing, CB&I submitted to the board a Brief of Facts, Law, and Argument. (Tr. pp. 77-101.) Counsel for Appellees asked for permission to reply to CB&I's brief, which

*/ Reference is made to Reporter's Transcript of Arbitration Proceedings, Volumes 1 and 2, which are Miscellaneous Exhibits to the Transcript.

permission was granted. (RTAP pp. 179-180, and 304-305.) These briefs were referred to by the court below in paragraph (g) on page 5 of its Order Confirming Award of Arbitrators. (Tr. p. 134.)

On August 26, 1965 Mr. Charles Ziemer, of CB&I's legal department, wrote to Mr. Elsener, the arbitrator appointed by CB&I, enclosing certain tabulations of alleged discrepancies in the calculation of the backcharges by Ets-Hokin. (Tr. pp. 38-47.) This letter constitutes the basis of CB&I's contention that the court below should have modified the award.

On August 30, 1964, the board issued a written memorandum signed by two of its members, Messrs. Corwin and Murphy. (Tr. pp. 125-129.) The third arbitrator, Mr. Elsener, filed a written dissent as to "some of the findings stated in the award". (Tr. p. 65.) The court below referred to the majority memorandum and the dissent in paragraphs (h) and (i), respectively, on page 5 of its Order Confirming Award of Arbitrators. (Tr. p. 134.) The board's award in effect held that Ets-Hokin was entitled to backcharge CB&I in the amount of $16,850.45 and that it must pay to CB&I the balance of moneys withheld, namely, $20,227.11.

On November 5, 1965, counsel for Appellees advised counsel for CB&I in writing that Ets-Hokin was thereby formally tendering to CB&I the amount awarded by the arbitration board, namely, $20,227.11. Counsel for CB&I thereafter responded by telephone that CB&I intended to challenge the award in subse-

quent legal proceedings. The formal tender was therefore rejected.

On or about November 24, 1965, CB&I filed its Motion to Vacate Stay Order and Alternate Motion to Vacate the Arbitration Award in the United States District Court for the District of Arizona. From the denial of that Motion and Alternate Motion CB&I has taken its appeal in No. 21033, which has been consolidated for hearing with the within appeal.

On or about November 29, 1965, CB&I filed in the United States District Court, Northern District of California, Matter No. 44430, entitled Application for Order of the Court to Set Aside Arbitration Award. (Tr. p. 25.) On December 20, 1965, Ets-Hokin and Travelers filed their Reply and Memorandum in Opposition to Application. (Tr. p. 51.) On December 20, 1965, Ets-Hokin and Travelers also filed in the United States District Court, Northern District of California, Matter No. 44552, entitled Petition to Confirm Arbitration Award. (Tr. p. 116.) On or about February 4, 1966, CB&I filed its Objections to Confirmation of Award. (Tr. p. 10.) On March 23, 1966, Ets-Hokin and Travelers filed their Memorandum in Support of Petition to Confirm Arbitration Award. (Tr. p. 1.)

On March 1, 1966, the court below, pursuant to stipulation of the parties, consolidated matters Nos. 44430 and 44552 for all further proceedings before the court. Oral argument on both matters was held before Judge Zirpoli on March 30, 1966. On December 30, 1966, Judge Zirpoli issued

his Order Confirming Award of Arbitrators (Tr. p. 130), which also denied CB&I's Application for Order of the Court to Set Aside Award. The court concluded in its Order with the following sentence:

> "This opinion shall constitute the findings of fact and conclusions of law of the Court, and based thereon defendant is directed to submit an appropriate judgment to the Court." (Tr. p. 139.)

Judgment on the court's Order was signed by Judge Zirpoli on January 11, 1967 (Tr. p. 49.), and was entered of record on January 16, 1967. (Tr. p. 50.) On February 15, 1967, CB&I filed its Notice of Appeal from the Judgment of the court below (Tr. p. 140.), and filed its Appeal Bond in the amount of $250.00 (Tr. p. 142.)

Questions Presented

1. Did the order of the United States District Court for the District of Arizona, which stayed CB&I's Miller Act lawsuit pending arbitration, limit the authority of the arbitrators to decide issues presented to them?

2. What is the scope of review by a court of an arbitration award?

3. Was the court below correct in finding that the parties expanded the issues presented to the arbitrators by their later acts?

4. Was the court below correct in finding that the arbitrators had ruled that CB&I undertook contractually to perform the prestressing work?

5. Was the court below correct in finding that the arbitrators heard extrinsic evidence only for the purpose of interpreting the subcontract?

6. Was the court below correct in finding that there was no basis for modification of the award?

SUMMARY OF ARGUMENT

1. The Court Below Correctly Decided That The Order Of The United States District Court For The District Of Arizona, Staying The Litigation Pending Arbitration, Did Not Limit The Power Of The Arbitrators To Consider All Issues Put To Them By The Parties.

2. The Scope Of Review Of An Arbitration Award Is Extremely Limited. A Court May Not Substitute Its Judgment For That Of The Arbitrators. An Award May Not Be Set Aside By A Court For Error Either In Law Or Fact, Nor For Mere Ambiguity In The Opinion Accompanying The Award.

3. The Court Below Properly Found That By Their Acts The Parties Had Broadened The Issues Submitted To The Arbitrators To Include The Issue Of The Intent And Understanding Of The Parties As To Who Would Perform The Work Of Prestressing The Spiral Cases.

4. The District Court Was Correct In Finding That The Arbitrators Had Ruled That CB&I Was Contractually Bound To Perform The Prestressing Work, Even Though This Obligation Was Not An Express Written Covenant Of The Contract.

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5. The Court Below Properly Held That The Board Resorted To Extrinsic Evidence Only To Clear Up An Ambiguity In The Subcontract, Namely, To Determine Whether The Installation Of The Spiral Cases Was Intended And Understood By The Parties To Include The Prestressing Of The Spiral Cases.

6. The Court Below Correctly Refused To Modify The Award.

ARGUMENT

1. The Court Below Correctly Decided That The Order Of The United States District Court For The District Of Arizona, Staying The Litigation Pending Arbitration, Did Not Limit The Power Of The Arbitrators To Consider All Issues Put To Them By The Parties.

CB&I contends that the order of the Arizona District Court, which granted Ets-Hokin's Motion for Stay of Action Pending Arbitration "only as to specific items raised in the motion" limits the issues which could be placed before the arbitrators by the parties. Judge Zirpoli answered this contention properly and completely in his Order Confirming Award of Arbitrators. (Tr. p. 135.) He said:

> "Before considering the merit of plaintiff's [CB&I's] position, it should be noted that the arbitrators' authority was not limited by the order of the Arizona District Court. The remedy sought by the defendant [Ets-Hokin] in the Arizona District Court was merely the staying of the

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> Miller Act lawsuit under Section 3 of Title 9 U.S.C.*/ The Court's order did not direct the parties to arbitrate. It merely stayed the lawsuit pending arbitration in accordance with the agreement of the parties. Thus, the arbitrators derived their authority not from the order of the Court, but from the arbitration agreement, Article 23 of the General Conditions of the Subcontract, as specified by the demand for arbitration and the later statements and briefs of the parties defining the issues for arbitration. American Almond Products Co. v. Consolidated Pecan Sales Co. [144 F. 2d 448, 450 (2d Cir. 1944)]."

Judge Zirpoli, in his decision, correctly differentiated section 3 from section 4**/ of the United States Arbitration Act. Section 3 provides for a stay of litigation before the court pending arbitration under an agreement between the parties. Section 4 provides for an order that the parties arbitrate certain disputes. CB&I argues on pages 9-10 of its Opening Brief that sections 3 and 4 should be read together, thus converting a stay order under section 3 to a mandate to arbitrate. CB&I cited no authority in support of this argument. Nor does logical analysis justify the rewriting of the express statutory language. This argument should be rejected.

It is absolutely clear from the record that Ets-Hokin sought and obtained an order staying the Miller Act action under section 3 pending an arbitration in accordance with Article 23

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*/ Set out in full in Appellant's Opening Brief, Appendix B.

**/ The full text of section 4 of the United States Arbitration Act is set out in the Appendix to this Brief.

of the subcontract between the parties, which provided for arbitration of all disputes arising out of the subcontract.

After the stay order, the parties proceeded with the arbitration, wrote memoranda, argued their case to the arbitrators, put on witnesses, and introduced documents in evidence. CB&I made no objection to the board that it considered the arbitration to be improperly or illegally constituted or that it was proceeding with the arbitration only under protest. CB&I made no objection that the arbitrators were considering questions beyond the scope of the stay order. Only after it received what it considered to be an unfavorable award did it return to the court to complain that the arbitrators exceeded their powers.

Appellees submit that even though CB&I agreed to arbitrate rather than litigate its disputes, CB&I has demonstrated that it would be willing to accept the results of the arbitration only if it considered the award to be in its favor. When it determined that the award was not in its favor, CB&I sought to litigate the dispute as if there were no arbitration clause. Arbitration is meant to provide a quick and final remedy to disputes, not to be a mere prelude to litigation. In the American Almond case, supra, on facts much less favorable to the party seeking to uphold the award, the court refused to let the other party proceed through the arbitration to an award, allowing the arbitrators to consider a question without protest, and then protest to the court that the arbitrators were exceeding their powers in considering that question. American Almond

Products Co. v. Consolidated Pecan Sales Co., 144 F. 2d 448, 450 (2d Cir. 1944). CB&I should not be allowed two bites at the apple.

2. The Scope Of Review Of An Arbitration Award Is Extremely Limited. A Court May Not Substitute Its Judgment For That Of The Arbitrators. An Award May Not Be Set Aside By A Court For Error Either In Law Or Fact, Nor For Mere Ambiguity In The Opinion Accompanying The Award.*/

All objections made by CB&I in its Opening Brief, other than that answered in paragraph 1 of the Argument above, are objections to the award of the arbitrators. This paragraph 2 sets out the established principles which guide a court in its review of an arbitration award. Succeeding paragraphs will answer specific objections made by CB&I to the award.

The leading case in this circuit on the scope of review of an arbitration award is San Martine Compania De Navegacion, S.A. v. Saguenay Terminals Ltd., 293 F. 2d 796 (9th Cir. 1961). In that case, after an award by the arbitrators awarding certain sums of money to San Martine as damages, the District Court for the District of Hawaii, in a proceeding on a petition for confirmation of the award, modified the award deleting therefrom the items of damages. The District Court

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*/CB&I has recognized the extremely limited scope of review of arbitration awards. See its Opening Brief in No. 21033, with which this appeal has been consolidated for hearing, pages 12-14, and its Reply Brief in No. 21033 p. 8.

based its order on the grounds that the arbitrators "exceeded their jurisdiction and that the award of damages in the above amount was beyond the scope of the arbitrators' authority". This Court reversed.

In its decision, this Court made the following statements, which state rules of law binding under the doctrine of stare decisis. They are also persuasive in their logic:

> "It may well be that the arbitrators' views of the facts and of the law relating to the matters on account of which they awarded damages are open to serious question. . . . But an award such as this, which is one within the terms of the submission, will not be set aside by a court for error either in law or fact. This rule and the reasons for it were set forth in Burchell v. Marsh, 17 How. 344, 58 U.S. 344, 349, 15 L. Ed. 96: 'Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity. If the award is within the submission and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation.'
>
> "As stated in Amicizia Societa Navegazione v. Chilean Nitrate and Iodine S. Corp., 2 Cir., 274 F. 2d 805, 808: 'The statutory provisions, 9 U.S.C.A. §§10, 11, in expressly stating certain grounds for either vacating an award or modifying or correcting it, do not authorize its setting aside on the grounds of erroneous finding of fact or of misinterpretation of law.'" (293 F. 2d, at 800.)

Thus, a court, in reviewing an award of an arbitration

board, may not substitute its judgment for that of the arbitrators It is limited by sections 10 and 11 of the United States Arbitration Act, 9 U.S. Code §§ 10, 11,*/ to the grounds there specified for vacation or modification of the award. Mere error of law or fact are not among those stated grounds.

Nor is ambiguity in the award grounds for vacation or modification. As the United States Supreme Court said in United Steel Workers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960):

> ".... A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement...."

See also Note, 63 Harv. L. Rev. 681, "Judicial Review of Arbitration Awards on the Merits" (1950).

Having stated the general principles which we respectfully suggest must guide this Court in its review of the decision of the court below upholding the award of the arbitrators, we next proceed to consider the specific objections to the District Court's ruling, and hence to the award of the arbitrators, raised by CB&I in its Opening Brief.

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*/ Set out in full in Appellant's Opening Brief, Appendix B.

3. The Court Below Properly Found That By Their Acts The Parties Had Broadened The Issues Submitted To The Arbitrators To Include The Issue Of The Intent And Understanding Of The Parties As To Who Would Perform The Work Of Prestressing The Spiral Cases.

The burden was upon CB&I to demonstrate that the award was beyond the powers of the arbitrators and should therefore be set aside. American Almond Products Co. v. Consolidated Pecan Sales Co., 144 F. 2d 448, 450 (2d Cir. 1944). The court below applied this rule (Tr. p. 131, lines 6-11.) and held that CB&I had not sustained its burden.(Tr. p. 138, lines 16-21.)

The District Court found that "the Board was not limited in its powers to the subcontract and the first demand of defendant [Ets-Hokin] for arbitration made on August 14, 1964." (Tr. p. 135, lines 16-19.) The court further found that the demand for arbitration was broadened by the parties in their preliminary statements of issues submitted to the arbitrators prior to the hearing, the statement of CB&I's counsel at the hearing, and the answers of the parties to questions propounded by the neutral arbitrator, Mr. Corwin.

CB&I argues, on pages 11-19 of its Opening Brief, that at no time did it agree to expand the issues before the arbitrators to include the intent and understanding of the parties. CB&I goes into a lengthy explanation of what it meant in each instance pointed to by the District Court as evidence of an expansion of the issues. However, the subjective intent of

CB&I or its counsel is irrelevant. What is relevant is what the parties said and did and what the arbitrators could reasonably believe were the issues submitted to them for decision. On the record, Appellees submit that the District Court properly concluded that the award was within the scope of the issues submitted, as the issues had been supplemented and broadened by the acts and statements of the parties. (Tr. p. 138, lines 1-10.)

4. The District Court Was Correct In Finding That The Arbitrators Had Ruled That CB&I Was Contractually Bound To Perform The Prestressing Work, Even Though This Obligation Was Not An Express Written Covenant Of The Contract.

CB&I repeatedly argues that the arbitrators found that CB&I did not agree in the subcontract to perform the prestressing work, but that nevertheless the arbitrators determined to impose a moral obligation on CB&I to do or pay for the prestressing work. Much of its argument under Specification of Error No. 2 and all of its argument in paragraph A under Specification of Error No. 3 of its brief is directed to this point. In examinin CB&I's argument it might appear that the question of whether CB&I agreed to furnish a "standby operator" is something different from the question of whether CB&I agreed to do the prestressing. It is not. Ets-Hokin's backcharges consisted of the wages paid to the man who was charged with watching the pressure gauges during the prestressing period, that is, the "standby operator". (See RTAP pp. 192, 232-233, 261-262,

319-320.)

Appellees submitted to the court below, and the court found (Tr. p. 136, line 24, page 137, line 5.), that a reasonable interpretation of the paragraphs 8, 11, and 12 of the majority opinion*/ is that while there was no express covenant in the subcontract for CB&I to perform the prestressing work, it was understood and intended by the parties that the task of installation of the spiral cases included the prestressing work. This was a contractual, not merely a moral, obligation. The District Court further pointed out that:

> "This understanding of findings 8, 11 and 12 is confirmed in the penultimate paragraph of arbitrator Elsener's dissent, wherein he states:'. . . . Either Chicago Bridge agreed to do the prestressing work or it did not. The majority of this Board says it did. [Emphasis by District Court.]'" (Tr. p. 137, lines 5-10.)

Still later in its opinion the District Court found that,

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*/ Findings 8, 11, and 12 of the majority opinion of the Board provide:

"8. That the oral offering of furnishing a stand-by operator by a responsible representative of Chicago Bridge and Iron Company to secure a contract should be as binding as the written word, as no evidence was presented of a written acceptance or refusal of this offer.

"11. That Chicago Bridge and Iron Company should have performed the prestressing of the spiral case and the Ets-Hokin Corporation should have performed the cooling of the concrete surrounding the spiral case.

"12. That the Chicago Bridge and Iron Company's claim that if responsible, they should not be charged overtime rates, this must be denied as Exhibit 83, pp. C-9, covers work which Chicago Bridge and Iron Company agrees to perform, etc. Evidence indicates they did not agree to perform the prestressing work."

> "[E]ven if it be conceded that a comparison of paragraph 8, 11 and 12 of the majority opinion accompanying the award leads one to conclude that the award was ambiguous, this is not a ground for the Court to set aside the award. [Citing United Steel Workers of America v. Enterprise Wheel & Car Corp., supra, paragraph 2 of this Argument.]" (Tr. p. 138, lines 22-27.)

Finally, Appellees submit that if the District Court's and CB&I's differing interpretations of the meaning of the majority opinion accompanying the award are both plausible, it is the rule that the interpretation should be given the award which upholds its validity. Griffith Co. v. San Diego College for Women, 45 Cal. 2d, 501, 516 (1955), Nickals v. Ohio Farmers Ins. Co., 237 F. Supp. 904, 906 (N.D. Cal. 1965). In this case, the District Court's interpretation of the award should be upheld.

5. The Court Below Properly Held That The Board Resorted To Extrinsic Evidence Only To Clear Up An Ambiguity In The Subcontract, Namely, To Determine Whether The Installation Of The Spiral Cases Was Intended And Understood By The Parties To Include The Prestressing Of The Spiral Cases.

CB&I says again and again that the arbitrators by hearing extrinsic evidence violated the integration parol evidence rule and in effect made a contract for the parties. As we showed in paragraph 4 of this Argument, the District Court found that the arbitrators were enforcing what they found to be an existing contractual (legal) obligation.

The court below further found (Tr. p. 135, lines

22-30, p. 138, lines 1-9) that on the basis of the entire reco as summarized on pages 4 and 5 of its Order Confirming Award o Arbitrators (Tr. pp. 133-134), the arbitrators resorted to ex- trinsic evidence only to assist them in interpreting the ambiguity in the subcontract as to whether or not the work of installing the spiral cases included the prestressing work. Appellees submit that the record fully supports the court's finding on the use of extrinsic evidence.

Even if the arbitrators "violated the parol evidence rule", as CB&I argues,*/ that is not a ground for vacation of the arbitration award. This is but another application of the rule argued at length in paragraph 2 of this Argument that an award is not to be set aside for mere errors of law. Unless the parties agree that the arbitrators are to be bound to appl technical rules of law, they are free to decide a dispute in accordance with their notion of justice. See 5 Am Jur 2d, Arbitration and Award §140, particularly the authorities cited at notes 5 and 6. See also Annotation, 112 ALR 878; and Sapp v. Barenfeld, 34 Cal. 2d 515, 520 (1949). In the Sapp case th court said, at page 523:

> "Even though a party expressly asserts a lawful claim in the submission or raises it by the presentation of evidence to the arbitrators, the law does not guarantee that the claim will be allowed. Arbitrators, unless

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*/ CB&I recognized that the arbitrators were not bound to appl the parol evidence rule and so stated in argument to the arbitrators at the hearing. (RTAP, p. 15, lines 3-7.)

> specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action. . . . Even if the omission to find as to those items was due to a mistake on the part of the arbitrators, nevertheless the omission was in effect a disallowance of those items, which became final and conclusive when the award was made and proper notice thereof given to the interested parties."

6. The Court Below Correctly Refused To Modify The Award.

The District Court's power to modify the award of the arbitrators is derived from and limited to the specific instances set out in subsections (a), (b) and (c) of Section 11 of the United States Arbitration Act, 9 U.S. Code §11.*/ As Appellees argued to the court below (Tr. p. 6), the only provision of Section 11 on which CB&I could rely for the modification of the award was the first clause of subsection (a) of Section 11, which provides that the court may modify or correct the award "where there was an evident material miscalculation of figures." The power of the District Court to modify the award due to an evident material miscalculation of figures must be limited to a miscalculation on the face of the award itself. Otherwise, the court would in effect be substituting its judgment for that of the arbitrators in the guise of modifying or correcting the

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*/ Set out in full in Appendix B to Appellant's Opening Brief.

award. James Richardson & Sons, Ltd. v. W.E. Hedger Transportation Corp., 98 F. 2d 55, 57 (2d Cir. 1938), San Martine Compania De Navegacion, S.A. v. Saquenay Terminals, Ltd., supra. It is certainly not evident from the face of the award that there has been a material miscalculation of figures by the arbitrators. Therefore, the court below was correct in rejecting Appellant's request for modification.

If this Court should determine to go beyond the face of the award in determining whether there has been a miscalculation, Appellees point out, as they did to the court below (Tr. pp. 7 and 8), that there is no evidence that any verified information requiring a modification of the award was ever submitted to the arbitrators. Instead, it appears from the record that Mr. Ziemer, an employee of CB&I, transmitted a tabulation of alleged discrepancies to CB&I's arbitrator on August 26, 1965. (Tr. pp. 38-47.) In his covering letter Mr. Ziemer stated "You may wish to submit a copy of the attached to Corwin to show him that discrepancies do exist and should be explained and an amount arrived at before any finding in terms of dollars is made by the board." For all that is shown in the record, what Mr. Elsener did or did not do is unknown. He did not mention this point in his separate opinion dated August 30, 1965.

The court below was correct in refusing to speculate as to what "corrections" might have been made by the board had the evidence been properly submitted to the board.

This Court should affirm the District Court's refusal

to modify the award.

CONCLUSION

1. The power of the arbitrators to decide the questions put to them by the parties was not limited by the order of the Arizona District Court staying CB&I's Miller Act action pending arbitration. The arbitrators derived their authority not from the order of the Arizona District Court but from the agreement of the parties and their later acts defining the issues for arbitration.

2. An award may not be set aside by a court except on the grounds stated in Section 10 of the United States Arbitration Act. These grounds do not include error of law or fact or ambiguity in the opinion accompanying the award.

3. The issues submitted to the arbitrators included the intent and understanding of the parties as to who would perform the prestressing, that is, who would furnish the standby operator.

4. The arbitrators found that CB&I contractually bound itself to perform the prestressing.

5. In hearing extrinsic evidence to explain the ambiguity in the subcontract, the arbitrators did not violate the parol evidence rule. Even if they did violate the parol evidence rule, such violation at worst constituted an error of law, for which an award may not be set aside.

6. Nothing on the face of the award evidences a material miscalculation of the amount of the award. Furthermore,

nothing in the record demonstrates that the board did not properly calculate the award on the basis of evidence submitted to them.

7. CB&I has not sustained its burden to demonstrate that the award should be vacated or modified. The judgment of the court below affirming the award of the arbitrators and refusing to vacate or modify the award should be affirmed.

Respectfully submitted,

FELDMAN, WALDMAN & KLINE

Attorneys for Appellees

By Laurence N. Walker
Laurence N. Walker

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Laurence N. Walker
Laurence N. Walker

APPENDIX

Sec. 4, United States Arbitration Act, 9 U.S. Code §4.

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is

raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.